85-680

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1985

CLIFFORD BRIAN KOMOTO
Petitioner,

v.

STATE OF WASHINGTON
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS DIVISION ONE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a finding of probable cause may be sustained absent a clear finding of sufficiently particularized facts and information.

2. Whether, consistent with the Fourth Amendment to the United States Constitution, police and prosecutors may ignore the availability of telephonic search warrants and conduct an immediate, warrantless, nonconsensual, nighttime entry into a suspect's home to obtain blood alcohol evidence.

3. Whether the body's natural metabolism of alcohol constitutes, in and of itself, an exigency of sufficient gravity to permit a warrantless, nonconsensual, nighttime entry into a suspect's home.

4. Whether, consistent with the Fourteenth Amendment to the United States Constitution, a State may allow selective implementation of telephonic warrant

procedures on a jurisdiction by jurisdiction basis.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings appear in the caption of the case in the United States Supreme Court.

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No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1985

CLIFFORD BRIAN KOMOTO,

Petitioner,

vs.

THE STATE OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI

to the Court of Appeals of the State of Washington, Division One

Petitioner CLIFFORD BRIAN KOMOTO respectfully prays that a writ of certiorari be issued to review the opinion of the Court of Appeals of the State of Washington made on April 8, 1985, review having been denied by the

Supreme Court of the State of Washington on August 22, 1985.

OPINIONS BELOW

Relevant portions of the transcript of defendant's motion to supress are reproduced at appendix A. The trial court's findings of fact and conclusions of law are reproduced as appendix B. Relevant portions of the verbatim transcript of the trial are reproduced at appendix C. The opinion of the Court of Appeals of the State of Washington which is reported as State v. Komoto, 40 Wn. App. 200, 697 P.2d 1025 (1985), has been reproduced as appendix D. The letter of the Supreme Court of the State of Washington denying the Petition for Review, by Order number 141/110 has been reproduced as appendix E. The Court of Appeals of Washington Mandate Terminating Review dated September 25, 1985, has been

reproduced as appendix F.

JURISDICTION

The Order sought to be reviewed is the opinion of the Court of Appeals of the State of Washington, Division One, which was filed on April 8, 1985. On August 22, 1985, the Supreme Court of the State of Washington denied a timely request for review and on September 25, 1985 the Clerk of the Court of Appeals of the State of Washington certified that the decision of the Court of Appeals had become final.

The jurisdiction of this Court is invoked under section 1257(3) of title 28 of the United States Code.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in

relevant part, that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On August 27, 1982, at approximately 1:10 a.m., an automobile swerved from the road and struck a pedestrian. The driver did not stop. The suspect vehicle was followed for some time by another driver, who witnessed the

accident. The witness returned to the accident scene, and gave a description of the suspect vehicle and its license number to investigating officers.

A registration check showed the vehicle belonged to petitioner Komoto. One of the investigating officers recognized the vehicle description and remembered Komoto's name as that of a driver he had stopped the previous evening. At that time, the officer had stopped Komoto, performed field sobriety tests, cited Komoto for improper lane travel, and released him.

The officers proceeded to Komoto's apartment, arriving at approximately 2:00 a.m.. They observed the suspect vehicle parked at Komoto's address and observed signs of damage to the windshield and hood.

The officers looked through the window of Komoto's ground floor

apartment, and saw the television and lights on. They knocked on the door but received no answer. They confirmed Komoto's address with the apartment manager and then telephoned the King County Senior Deputy Prosecuting Attorney.

The prosecutor told the officers that they had probable cause and sufficient exigent circumstances to enter Komoto's apartment to get a blood sample. The officers got a key from the manager, entered the apartment, and found Komoto asleep on his bed. They awakened and arrested Komoto and transported him to a local hospital where a blood sample was taken.

Komoto was charged with violation of the Revised Code of Washington section 46.52.020 (felony hit and run). The trial court denied Komoto's motion to supress evidence, holding that probable

cause existed for the felony arrest, exigent circumstances justified a warrantless arrest in Komoto's home, and that all evidence was properly seized. The trial court's findings of fact and conclusions of law is reproduced as appendix B.

Komoto appealed. The Court of Appeals of the State of Washington, Division One, affirmed by its opinion filed April 8, 1985, holding that the State had proved the corpus delicti of the crime, that probable cause existed for Komoto's arrest, that the warrantless entry into the residence was justified by exigent circumstances and that all evidence was properly seized. (App. D, p. 2). The opinion of the Court of Appeals of the State of Washington is reproduced as Appendix D.

A Petition for review was considered by the Supreme Court of the State of

Washington on its August 22, 1985 En Banc Administrative Conference. The petition was denied by Order number 14/110, filed on August 22, 1985. On September 25, 1985, the Clerk of The Court of Appeals of the State of Washington filed a mandate certifying termination of review, reproduced here as Appendix F.

The Constitutional issue presented by the violation of the petitioner's rights under the Fourth Amendment to the United States Constitution was briefed to the Court of Appeals of the State of Washington and in the Petition for review to the Supreme Court of the State of Washington. The Constitutional issue presented by the denial of petitioner's right to equal protection under the law represents a change in settled State law and did not become appealable until denial of the Petition for review by the Supreme Court of the State of Washington.

1. A writ or certiorari should issue because of the egregious disregard of the facts by the court below in its determination of probable cause.

Although the Court generally declines to question findings of fact by courts below, the finding of probable cause herein involved so blatant a distortion of the facts as to compel review. A determination of probable cause must be based on those facts and circumstances within an officer's knowledge, of which he has sufficient facts and information, to permit a reasonably prudent person to believe that the defendant has committed an offense. Beck v. Ohio, 379 U.S. 89, 91, (1964). Probable cause must be based on sufficient particularized information, not mere suspicion, belief or guesswork. Wong Sun v. United States, 371 U.S. 471, 480 (1963). In the present case, the court below based its finding of probable

cause on speculation and facts not in the record.

The court claimed that Komoto had exhibited a pattern of erratic driving (App. D at p.21), in spite of direct testimony to the contrary at trial (App. A at p. 4). The court also found that, some 26 hours before the accident in question, after an officer had stopped Komoto for speeding and administered field sobriety tests the officer allowed Komoto go home "as the stop occurred approximately 3 to 4 blocks from Komoto's residence." (App. D, at p.5) In fact, the officer testified at trial that he had released Komoto because he believed that Komoto's conduct was not indicative of impairment sufficient to sustain a conviction for drunk driving. (App. A at p. 3). The court below combined these misstatements of fact with the officer's "belief" that the probability of an early

morning hit and run accident will be alcohol related was very high (App. D at p. 23) to conclude that there was probable cause to believe that Komoto had been driving while intoxicated.

The facts known to the officers at the time they entered Komoto's apartment do not contain any factual or particularized evidence from which they could form the belief that evidence of blood alcohol would be found in Komoto's body. Neither the officers nor the witnesses had any evidence that Komoto had been drinking or that the driver of the hit and run vehicle had exhibited any signs of erratic driving before or after the accident. After this unsupported finding of probable cause to believe that blood alcohol evidence would be found in Komoto's body, the court began its tortured analysis of exigent circumstances.

2. A writ of certiorari should issue because the State's claim that the opportunity to obtain a telephonic warrant can be ignored any time police seek to seize blood alcohol evidence is contrary to principles set forth by this court.

The Washington State Court of Appeals, the Washington Supreme Court having denied review, held in this case that whenever a serious alcohol related offense is suspected, the police may make an immediate, warrantless, nighttime, nonconsensual, entry into a suspect's home, to obtain blood alcohol evidence, regardless of the availabilty of a warrant. (App. D at p. 33). The court summarily dismissed Komoto's argument that the police should have obtained a telephonic search warrant, reasoning that "the immediate need for taking a blood sample under the circumstances" was a sufficient exigency to justify proceeding without attempting to obtain any warrant, telephonic or otherwise. (App. D, p. 33,

emphasis in original).

The court found exigent circumstances from the fact that Komoto was suspected of a serious alcohol related offense, (App. D at p. 24), and held that "any delay" in testing for blood alcohol evidence creates the risk that a suspect may drink more alcohol (App. D at p. 33, emphasis in original). Thus, the court held, as a matter of law, that whenever a serious offense and blood alcohol evidence is involved, analysis of the time needed to obtain a telephonic search warrant is irrelavent. This holding and reasoning is contrary to principles expressed by this Court and well reasoned opinions of lower federal courts.

Wherever practicable, a warrant should be obtained. Chimel v. California, 395 U.S. 752, 759.(1969). Exigent circumstances justifying exceptions to

the warrant requirement are few in number and should be carefully delineated. United States v. United States District Court, 407 U.S. 297, 318 (1972). Where intrusions into the home are involved, the examination of exigent circumstances should be most exacting. The right of a person to be secure in his home involves the most fundamental area of constitutionally guaranteed privacy. Payton v. New York, 445 U.S. 573, 588-90, (1980). The court below has created a broad category of offenses that, in its view, constitute per se exigent circumstances. This simplistic approach ignores the heavy burden placed upon the state whenever exceptions to the warrant requirement are asserted.

When claiming exigent circumstances, the police must show that a warrantless entry is "imperative", McDonald v. United States 335 U.S. 451, 456, (1948), and

that immediate entry is urgently required to preserve evidence. Dorman v. United States. 435 F.2d 385, 392 (D.C. Cir. 1970). Where blood alcohol evidence is involved, the time needed to obtain a warrant must be considered in determining whether exigent circumstances exist. Schmerber v.California, 384 U.S. 757, 771, (1966). Courts reviewing warrantless entries have held that the court must consider the amount of time needed to obtain a telephonic warrant when assessing the urgency of the situation. United States v. Cuaron,700 F.2d 582, 589 (10th Cir. 1983).

We are mindful of the fact that the Framers did not contemplate either modern communications or the threat posed by

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See also, United States v. Manfredi, 722 F.2d 519, 522 (9th Cir. 1983); United States v. Morgan,744 F.2d 1215, 1221 (6th Cir. 1984).

intoxicated drivers on our highways. This Court has reminded us, however, almost from its inception, that the Constitution was designed to provide for the growth and development of the law.[2] No longer must a constable trudge wearily to a magistrate's chambers. The officer's ability to plead his case for a warrant over the telephone, in a matter of moments, is a fact that should be scrutinized carefully by any court when the State raises the claim of exigent circumstances. A clear statement by this Court to the States is necessary to prevent further refusal by State courts to recognize the impact of telephonic warrants on police investigations and, in

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[2] "The Constitution was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages." Martin v. Hunter, 14 U.S. 562 (1816). exist. See also Payton v. New York, 445 U.S. 573, 591, n. 33 (1980).

effect, create exigencies, where none exist.

3. This case presents the court, for the first time, with the opportunity to directly address the question of whether the body's natural metabolism of alcohol constitutes, in and of itself, an exigent circumstance sufficient to justify a warrantless, nonconsensual, nighttime entry into a suspect's home.

This Court has long recognized the basic fact that the body's natural metabolism of alcohol can result in the inexorable destruction of evidence. Schmerber v. California, 384 U.S. 757, 771 (1966). This Court has never addressed tne question of whether or not this predictable and measurable biological process creates so strong a threat of the destruction of evidence as to constitute, in and of itself, circumstances so exigent as to justify a warrantless, nonconsensual, nighttime entry into a suspect's home.

In Welsh v. Wisconsin, ___ U.S. ___, 104 S.Ct. 2091 (1984), a drunk driving case, this Court held that where the underlying offense is relatively minor, a warrantless entry into the home can rarely be justified. The Court declined to reach the issue of exigent circumstances because the offense was a nonjailable civil offense under Wisconsin's statutory scheme.

In the present case, the court below held that Welsh and Schmerber settled the question of whether the body's natural metabolism of alcohol is an exigent circumstance justifying warrantless nonconsensual, nighttime entry into a suspecct's home. This is not the case. Schmerber dealt with a search incident to a lawful arrest, and in Welsh the Court declined to reach the question.

This Court has held that the exigency created by the threat of

destruction arises when police action must be "literally now or never" to preserve evidence. Roaden v. Kentucky, 413 U.S. 496, 506, (1973). The question here is whether such immediate action is necessary to preserve blood alcohol evidence. When a warrant is available, it must be obtained. Telephonic warrants permit the speedy imposition of a magistrate beween police and suspects. Modern laboratory tools are available for analysis and extrapolation of blood alcohol evidence. The effect of these developments has not been addressed by this Court.

The court below did not consider these crucial factors. It simply held that an emergency was created by "any delay" in testing for blood alcohol evidence creates the risk that a suspect may drink more alcohol. (App. D at p. 33, emphasis in original). More than

this prosaic analysis is needed where rights protected by the Fourth Amendment are at stake.

We are aware of the public's concern over drunk drivers and desire to stiffen drunk driving laws. We concur. It is not appropriate, however, to pursue these concerns by granting the police and prosecutors broad authority to trample the Fourth Amendment in their zeal to sieze evidence.[3] Justice is not done if the State's enthusiastic enforcement of

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[3] At least one Washington judge has stated the problem in no uncertain terms: ". . .I think, frankly, that if we were to put a stamp of approval upon that basis that we would have three so-called emergency entries a week in Cowlitz County. . .but if the county, the police department wants to have that ability, a tape recorder isn't that expensive, and in that case a warrant could have been obtained by telephone probably within five minutes. . ." State v. Bean, 89 Wn. 2d 467, 472, 572 P.2d 1102 (1978) (quoting the opinion of the trial court in the consolidated case of State v. Troutman). Res accendent lumina rebus.

the law upsets the balance between the citizen's right to be safe on the highway and the right to be secure in his home.

Modern law enforcement tools -- telephonic warrants and sophisticated laboratory procedures -- preclude the outdated approach utilized by the court below in its analysis of exigent circumstances. It is imperative, in light of contemporary technology, that this court reassess the effect of the body's natural metabolosm of alcohol on the exigent circumstances doctrine.

4. Selective implementation of telephonic search warrant procedures, on a jurisdiction by jurisdiction basis, violates a suspect's right to equal protection under the law.

At the time of Komoto's arrest, Washington's Superior Court Criminal Rules expressly permitted the police to

obtain a search warrant by telephone.[4] Prior to the decision of the Washington State Court of Appeals in this case, decisional law in Washington, as articulated by the State's highest court, held that the availabiltiy of telephonic warrants was a factor to be considered in determining exigent circumstances. State v. Ringer (1983) 100 Wn. 2d 686, 703, 674 P.2d 1240. Petitioner raised the issue on brief below, and the court although holding that in alcohol related

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[4] **Rule 2.3 SEARCH AND SEIZURE**

(b) Property Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be comimitted.

(c) Issuance and Contents. A warrant shall issue only on an affidavit or affidavits establishing the grounds for issuing the warrant. Such affidavit or affidavits may consist of an officer's sworn telephonic statement to the judge;...

offenses no attempt to obtain a warrant is necessary, noted that the procedures for complying with the rule were not in place. (App. D at p.33). This observation was somewhat less than frank.

Washington's rule permitting telephonic warrants, has been used by police and prosecutors as they see fit. Some jurisdictions use the procedure, some choose not to. Thus, whether a suspect is accorded the interposition of a neutral and detached magistrate depends on whether the prosecutorial regime in a particular jurisdiction chooses to call a judge when the police wish to make an "emergency" entry under questionable circumstances. As this Court has repeatedly stated, the right to subsequently challenge the reasonableness of a warrantless search is not the equivalent of the interposition of a neutral and detached magistrate prior to

that search. See, Chimel v. United States, 395 U.S. 752, 766 n. 12, (1969), United States v. United States District Court, 407 U.S. 297, 317-318 (1972). The prophylactic application of the Fourth Amendment is to prevent, not merely to redress, unlawful police action. The means for prevention is prior review by a neutral and detached magistrate. Beck v. Ohio, 379 U.S. 89, 96 (1964). The arbitrary and deliberate failure of law enforcement authorities in in the State of Washington to uniformly implement telephonic warrant procedures denies citizens throughout the state equal protection from unreasonable searches and seizures.

CONCLUSIONS

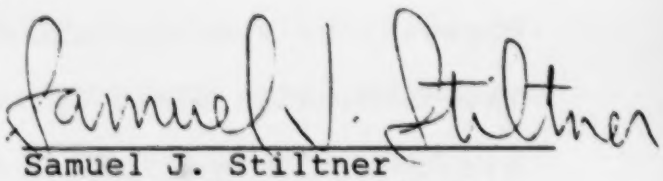
Petitioner submits that the Fourth Amendment to the United States Constitution, as interpreted by this

Court, prohibits a finding of probable cause absent sufficient particularized information on which to base that finding. Further, the Fourth Amendment prohibits the creation of a category of offenses in which the reasonableness of a warrantless, nighttime entry into the home is never to be restrained by the requirement of a warrant, no matter how expeditiously a warrant may be obtained. The Washington State Court of Appeals has granted the police and prosecutor a terrifying power; the right, any time a serious alcohol related offense is suspected, to make an immediate midnight entry into a citizen's home,drag him from his bed, and arrest him.

Petitioner further submits that, by allowing individual prosecutors to refuse to implement telephonic warrant procedures, the court below has granted the State the right to deny suspects

equal protection from unreasonable searches and seizures. Accordingly, this Court should either summarily reverse the decision or grant certiorari.

RESPECTFULLY SUBMITTED this 10th day of October, 1985.



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THE SUPERIOR COURT OF WASHINGTON

FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. CLIFFORD BRIAN KOMOTO, Defendant.	NO 83-1-01604-1

VERBATIM REPORT OF PROCEEDINGS

AT DEFENDANT'S MOTION TO SUPRESS

Pages 4 -5, Direct Examination of Trooper Peter F. Hanson:

Q. Okay. You were familiar with this car or the defendant?

A. Yes.

Q. Why is that?

A. I had stopped the defendant the night before.

Q. That would have been August 26th?

A. It would have been in the hours of, yes, the 26th. It was previous to

midnight.

Q. For what purpose did you stop the car?

A. Erratic driving.

Q. Who was the driver of that car?

A. Clifford Komoto.

Q. What were your observations of the defendant on the 26th when you stopped the car?

A. He had been driving, if I recall correctly, he was over the speed limit, and he had left his lane of travel a couple of times. I stopped him on Highway 518. And he had been drinking at the time.

Q. How could you tell he had been drinking on the 26th?

A. The odor of intoxicants.

Q. Did you run any physicals on him?

A. Yes.

Q. How did he perform?

A. He did the physicals probably

satisfactorily as far as having to step one foot in front of the other or holding his balance. To describe the tests, he was able to hold his balance and he was able to put his foot through the stepping that I required of him and he was able to stand reasonably straight. I felt that he was affected some. Just from his eye reaction speed, I felt that he was considerably affected, but I didn't feel that I would be able to convict him so --

Q. This is on the 26th?

A. Right.

THE SUPERIOR COURT OF WASHINGTON

FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. CLIFFORD BRIAN KOMOTO, Defendant.	NO 83-1-01604-1 FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on regularly for pre-trial motions on September 7, 1983 before the undersigned judge of the above-entitled court, the defendant Cliford B. Komoto being present and represented by counsel Shirley Bennington, and the State being represented by R. Timothy Crandell, Deputy Prosecuting Attorney for King County, and the court having read briefs submitted by counsel, and the court having heard argument by counsel, and the court having heard testimony by witnesses; now therefore, makes and

enters the following in regards to defense motion to suppress all evidence seized following the arrest of the defendant:

FINDINGS OF FACT

I.

That on August 27, 1982, at approximately 1:15 a.m. in King County an automobile registered to Clifford B. Komoto struck Eric Arnold, a pedestrian, on the shoulder of State Route 99. The driver failed to stop. An eyewitness to the accident followed Komoto's vehicle on SR 99 and obtained the license number and description of Komoto's vehicle, information which he related to the Washington State Patrol at the accident scene. The likelihood of Arnold's survival was not great.

II.

Trooper Hanson, upon receiving a radio broadcast of the vehicle

description and Komoto as its registered owner, and the seriousness of the victim's injuries, realized that he had stopped Komoto for erratic driving in the same car the previous evening. Komoto had been drinking on that previous occasion.

III.

Trooper Hanson responded to Komoto's residence within four minutes of receiving the information and located the hit and run vehicle. He observed fresh damage to the car and noted that it had just been driven. Hanson attempted to contact Komoto in his residence, but received no response after banging on his door. Lights were on in Komoto's residence. Fearing the destruction of evidence of Komoto's blood alcohol level, Hanson called King County Deputy Prosecutor Lee Yates and, after explaining the exigency of the situation,

was advised to effect a warrantless arrest. Komoto's vehicle was impounded at his residence as evidence following his felony arrest.

IV.

Komoto was arrested in his apartment, and transported to Valley General Hospital in Renton where a blood sample was taken. Komoto was arrested for felony hit and run and driving while intoxicated where there is a likelihood of death.

V.

Komoto was advised of his constitutional rights at his apartment, at the hospital, and at the South Office of the Washington State Patrol after each endorsement. Komoto acknowledged understanding his rights and waived his rights. He made oral statements to Trooper McElroy at the south office. Komoto was further advised at the

hospital of his rights to further and additional blood tests.

CONCLUSIONS OF LAW

I.

This court has jurisdiction over the parties and the subject matter in this action.

II.

Probable cause existed for the felony arrest of Komoto as the responsible party for the accident.

III.

RCW 46.20.308 authorized the non-consensual taking of a blood sample from the defendant.

IV.

Exigent circumstances existed for the warrantless felony arrest of Komoto in his residence, based on the need to obtain immediately a sample of Komoto's blood to determine the alcohol level therein before metabolic dissipation of

such alcohol could occur. Given the early hour of the morning, the erratic driving of Komoto which resulted in the accident, and the stop of Komoto on the previous evening which revealed he had been drinking, there is a reasonable presumption that alcohol was involved.

V.

All statements made by Komoto to Trooper McElroy are admissible, and were freely and voluntarily made after advisement and waiver of rights.

VI.

The impoundment of Komoto's vehicle was lawful, and evidence seized therefrom is admissible.

ORDER

Defendant's motion to supress is denied.

DONE IN OPEN COURT this 14th day of September, 1983.

James Dore, Judge

THE SUPERIOR COURT OF WASHINGTON

FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. CLIFFORD BRIAN KOMOTO, Defendant.	)	NO 83-1-01604-1

VERBATIM REPORT OF PROCEEDINGS

BEFORE: THE HONORABLE LEE KRAFT

Pages 48 - 49, Direct Examination of John B. McQueen:

Q. Now, did you observe anything unusual happen to these two people?

A. Well, yeah. I was -- the car that was in front of me, I saw the car drift off the road and as he drifted off the road he swerved back to the left and when he was swerving back to the left he hit one of the pedestrians.

Q. Now, when you say drifted off the

road, what do you mean when you say that in relation to the white line, the fog line of the road.

A. We were both in the right hand lane and he went off the shoulder, just, you know -- it wasn't a jerking motion the the right. It was just like a slow drift to the right.

Q. How far over that fog line did he go?

A. I'd have to guess somewhere around ten feet or so it seemed like.

Q. And was there ever any attempt to correct the car's direction of travel:

A. That happened at the last moment, he took a quick left, you know.

Q. Was that a jerking motion?

A. That was during the impact, yeah.

Pages 53 - 55, Cross-Examination of John B. McQueen:

Q. Mr. McQueen, you stated that you got within about 30 feet of the vehicle, is that corre

that correct?

A. In as much as I can estimate, yes.

Q. And you didn't see anyone inside?

A. I didn't -- I know there was -- somebody had to be driving it but I could not recognize who it was, no.

Q. Then after the impact, you then continued to follow, correct?

A. Yes ma'am.

Q. How fast was the vehicle going at that point?

A. We were -- it was the same speed. It was about I think whatever the speed limit was, about 40 miles an hour, which is what I am guessing.

Q. About 40 miles an hour. And can you describe for me the path that the automobile took?

A. We went -- we were going northward, north bound on 99. We were in the right hand lane. Then we got in the left hand lane up to where the freeway is, 154th.

Then the vehicle went westbound.

Q. Was that a normal left hand turn change?

A. Yes it was.

Q. Was the car weaving?

A. No, ma'am.

Q. So the car was just in normal flow of traffic?

A. Yes ma'am. There was no traffic. In fact, there was no traffic at the time, just me and the car.

Q. But it was normal?

A. Yes, it was.

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 13969-0-1
Respondent,	)	DIVISION ONE
v.	)	
CLIFFORD BRIAN KOMOTO,	)	
Appellant.	)	

COLEMAN, J. -- Clifford B. Komoto appeals his conviction for the crime of felony hit and run under R.C.W. 46.52.020. He assigns error to the trial court's denial of his pretrial motion to suppress certain evidence and denial of his motion to dismiss for failure to establish a prima facie case. We affirm.

On August 27, 1982, Komoto was arrested in his residence without a warrant for felony hit and run and driving while under the influence of alcohol. He was subsequently charged by

information with felony hit and run. On September 6 and 7, 1983, the King County Superior Court heard his motion to suppress his post-arrest statements, his blood test taken at Valley General Hospital, the impoundment of his car and evidence seized from his car. The trial court denied the motion, ruling that probable cause existed for the felony arrest of Komoto, exigent circumstances justified a warrantless arrest in his residence, and all evidence was properly seized. Following a jury trial, he was convicted and this appeal followed.

FACTS

On August 27, 1982 at about 1 a.m. a motor vehicle traveling north struck a pedestrian who was walking in the same direction on the northbound shoulder of Highway 99 near 170th Street in King County. Trooper Gary L. Johnson of the Washington State Patrol arrived at the

scene of the accident shortly thereafter. He observed that the victim had severe head injuries. The medics attending to the victim advised Trooper Johnson that the victim would probably not survive.

Two witnesses reported to Trooper Johnson. The first witness, Teresa Johnson, was walking next to the victim when he was struck by a car, but the only detail she remembered about the car was that it was green. The second witness, John McQueen, was driving north on Highway 99 shortly after 1 a.m. when he observed the car in front of him slowly drift to the right off the road, then quickly swerve back to the left, hitting one of the two pedestrians. McQueen saw the pedestrian's body thrown into the air by the impact. McQueen was about 30 feet behind the car, and continued to follow it at about the same distance and at a speed of about 40-45

mph, until the car turned left at 154th Street. At that point McQueen was able to see the car's license plate number. He returned to the scene of the accident and reported what he had seen to Trooper Johnson, describing the vehicle as a green Datsun Z-type car and giving the license plate number. Trooper Johnson then ran a registration check of the green Datsun by radio. The broadcast came back with the information that the car was registered to Komoto and provided Komoto's address.

Another Washington State Patrol trooper, Peter Hanson, heard the broadcast and recognized the registered owner as a person he had stopped for erratic driving approximately 26 hours prior to the accident in the same vicinity. The trooper's reason for stopping Komoto on that occasion was that he had been traveling over the legal

speed limit and had left his lane several times. Trooper Hanson administered physical sobriety tests and concluded that Komoto had been drinking more than was truly safe, but allowed him to drive home as the stop occurred approximately 3 to 4 blocks from Komoto's residence. Before permitting Komoto to drive home that night, Hanson issued a citation for improper lane travel. The accident in the present case occurred approximately 16 to 18 blocks from Komoto's residence, not far from the previous stop.

After Hanson heard the car registration broadcast on August 27, 1982, he proceeded to Komoto's residence and arrived there at about 2 a.m.. He observed the green Datsun with the broadcasted license number in the parking lot of Komoto's apartment complex. Troopers McElroy and Lindgren arrived soon after Hanson. All three noticed

that the front end and windshield of the car were damaged and that the car was still warm. The troopers observed no signs of forced entry into the locked vehicle.

Troopers Hanson and McElroy went to Komoto's door, knocked loudly, and yelled. When no one responded, Hanson contacted the assistant manager of the apartment complex and verified that the apartment was Komoto's and that he was the sole occupant. By this time, Hanson had learned that it was likely that the accident victim would die. The other troopers had heard this information during Trooper Johnson's radio broadcast. Hanson placed a call to Senior Deputy Prosecuting Attorney Lee Yates and repeated the facts of the accident and the investigation to Yates. He told Yates that he believed Komoto had been drinking on the night of August 25 when

Hanson had cited and released him. Yates advised Hanson that, given the circumstances, probable cause existed to believe that Komoto was the driver of the hit and run vehicle, and that there were exigent circumstances to justify an immediate warrantless arrest of Komoto for the purpose of obtaining a blood sample. Yates testified at the pretrial hearing that he told the trooper to proceed with a warrantless arrest because he feared losing evidence of Komoto's blood alcohol level, which, if Komoto had been drinking that night, would be dissipating.

Following his conversation with Yates, Trooper Hanson obtained a passkey from the assistant manager and returned to Komoto's apartment with Trooper McElroy. The troopers entered the apartment and found Komoto lying on his bed. They eventually aroused Komoto, advised him of his rights, and then

transported him to Valley General Hospital. At the hospital the troopers again advised him of his rights and told him that because he was under arrest for a hit and run accident involving the likelihood of death, a blood sample would be taken. The sample showed a blood alcohol reading of 0.19 percent. The troopers then took Komoto to the south office of the Washington State Patrol where he was advised of his rights a third time. In response to questioning, Komoto stated that he had been driving his vehicle that evening on Highway 99 in the vicinity of the accident and might have hit a pedestrian.

ISSUES

1. Did the State establish the corpus delicti of the offense of felony hit and run?

2. Was the information provided by McQueen and Trooper Hanson, coupled with

the reasonable inferences to be drawn from that information, sufficient to establish probable cause for Komoto's arrest, and if so, did exigent circumstances justify the warrantless nonconsensual entry and arrest and the subsequent taking of a blood sample?

CORPUS DELICTI

Komoto contends that the State failed to establish the corpus delicti of felony hit and run. He argues that proof of the corpus delicti of felony hit and run, as in the crime of driving while under the influence, must include evidence on the element of identity. Komoto contends that the State presented no direct or circumstantial evidence that he was the person who committed the crime, apart from his own statements; therefore, the State did not meet the requirements of corpus delicti. In response, the State argues that it

established the "slight" proof necessary to establish the corpus delicti prior to admission of Komoto's statements. See State v. Hamrick, 19 Wn. App. 417, 420, 576 P.2d 912 (1978). The State notes that Komoto's admissions were corroborated by testimony from McQueen and the troopers, indicating that the admissions were reliable.

State v. Meyer, 37 Wn.2d 759, 763, 226 P.2d 204 (1951), and State v. Goranson, 67 Wn. 2d 456, 459, 408 P. 2d 7 (1965) (quoting Meyer, at 763) establish that the identity of the person who has committed the crime is not normally material in establishing the corpus delicti; however, identity must be proven to sustain a conviction of the crime charged. State v. Hamrick, supra, relied upon by Komoto does not involve identity, the offense of driving while under the influence in that case did

require evidence of the defendant's identity. No Washington case has addressed the issue in the context of felony hit and run.

To prove that someone has committed the offense of driving while under the influence, the State must show that the defendant operated or was in actual physical control of a vehicle while he was under the influence. Evidence that the defendant was under the influence may be proven by one of three alternative methods. RCW 46.61.502; State v. Franco, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982). The defendant's physical condition is by definition a critical element of the crime. In contrast, felony hit and run does not require any showing of the defendant's physical state; rather, it requires proof that the driver did not perform the duties specified in the statute. RCW 46.5020. Thus proof of the

condition of the driver is not necessary to establish the existence of a criminal agency in felony hit and run.

Moreover, the facts in Hamrick also distinguish that case from the present one. In Hamrick, no one testified that they observed the defendant driving or in actual physical control of the vehicle while intoxicated. The officer arrived after the accident and spoke with the defendant, who was present and admitted that he had been driving the car involved in the accident. The only evidence connecting the defendant with the control of the car in Hamrick was his own admission. Washington cases clearly and consistently hold that a conviction cannot be sustained on a confession alone; some corroborative evidence establishing the corpus delicti is necessary to convict when a confession is part of the evidence. State v. Ryan, 103 Wn.2d 165,

177-78, 691 P.2d 197 (1984). Unlike Hamrick, in the present case, as our analysis demonstrates, the record provides independent evidence of Komoto's identity as the driver.

Proof of the corpus delicti of any crime requires evidence that the crime charged was committed by someone. State v. Fellers, 37 Wn. App. 613, 615, 683 P.2d 209 (1984). the amount of proof needed is "evidence of sufficient circumstances which would support a logical and reasonable deduction of the fact sought to be proved, . . ."State v. DePriest, 167 Wn. App. 824, 826, 560 P.2d 1152 (1977), which is less than that necessary to take the case to the jury, State v. Fagundes, 26 Wn. App. 477, 484, 614 P.2d 198, review denied, 94 Wn. 2d 1014 (1980). To prove that the crime of felony hit and run was committed by someone, the State was required to show

that a motor vehicle was driven in this state; the vehicle was involved in an accident; and injury or death of a person resulted; and the driver of the vehicle did not stop immediately and remain at the scene of the accident. RCW 46.52.020(1), (3). Two witnesses testified that they observed the green car hit the victim without stopping. This testimony, coupled with evidence of injury to the accident victim, was sufficient to establish the corpus delicti of the crime.

Even if we were to find that the Hamrick requirement of establishing identity did apply in these circumstances, the facts, independent of Komoto's admission, show that Komoto was the driver for the purpose of proving the corpus delicti. Prior to admission of Komoto's statements, McQueen specifically described the car involved

in the accident, and gave the license number which matched the license of Komoto's car. the car was registered to Komoto and was found parked in Komoto's space in the parking lot of his apartment complex shortly after the accident occurred. The troopers observed recent damage to the car consistent with the reported accident. The troopers also noted that the hood of the car was still warm. Finally, the troopers noticed no signs of forced entry into the locked vehicle, suggesting that if anyone had been using the car, that person was Komoto.

This evidence fulfilled another purpose of the corpus delicti rule as it pertains to confessions: To ensure that an innocent person will not be convicted absent some corroboration of his admission of guilt. Fagundes, at 484; see Ryan, at 177-78. Thus the State met its burden of proof in independently

establishing the corpus delicti prior to admission of Komoto's statements.

Once the corpus delicti of the crime has been shown by independent evidence, the admission of the defendant "'may be considered in combination with the other facts to establish the defendant's guilt beyond a reasonable doubt.'" Fagundes, at 484 (quoting Hamrick, at 419). To take a case to the jury, there must be "substantial evidence that the crime was committed and that defendant was the perpetrator." Fagundes, at 484. In response to questions on the alcohol and drug report form, Komoto told the troopers that he was driving on Highway 99 in the area of the accident on the morning of August 27, 1982; he had swerved to avoid two pedestrians; it was possible that he hit a pedestrian on Highway 99; no one else drove his car or had keys to it; and he had been drinking.

The circumstantial evidence, together with Komoto's statements and all the facts, was sufficient to allow the case to proceed to the jury. Consequently, the court did not err in denying Komoto's motion to dismiss.

PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES

Citing State v. Judge, 100 Wn.2d 706,711, 675 P.2d 219 (1984), Komoto contends that the taking of blood samples is a "search and seizure" under the state and federal constitutions, and that prior to seizure the State must have a "'clear indication' that in fact the desired evidence will be found." Judge, at 711. Komoto also argues that the warrantless nonconsensual entry of his residence was unconstitutional and all fruits flowing therefrom must be suppressed.

The constitutionality of both warrantless, nonconsensual entry and the subsequent taking of blood samples

largely depends on whether the troopers had probable cause to believe that blood alcohol evidence would be found in Komoto's body. With respect to the warrantless entry, it is well settled that police must show probable cause and exigent circumstances (or consent to entry) before making a warrantless entry into a person's home for a felony arrest. State v. Welker, 37 Wn. App. 628, 632, 683 P.2d 1110 (1984); Payton v. New York, 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980). In the present case, the State contends the troopers had probable cause to believe both that Komoto had been drinking, and that blood alcohol evidence was being destroyed by his body's natural effort to eliminate alcohol from his system. thus the State concludes that the imminent destruction of blood alcohol evidence created exigent circumstances sufficient to justify the

warrantless entry of Komoto's residence.

Setting aside for the moment the question of exigent circumstances, we turn first to the issue of whether there was probable cause to believe that evidence of blood alcohol would be relevant in this case. On this issue, we find the reasoning in People v. Keltie, 148 Cal. App. 3d 773, 196 Cal. Rptr. 243, 247-48 (1983) instructive:

> The biological fact that blood-alcohol content decreases with time would not in itself justify warrantless entry into the homes of persons suspected of felony driving offenses, since not all such offenses are due to drinking or proven by evidence of drinking, and not all drunk drivers proceed immediately to their homes. In order to justify an entry on this basis, the police would have to have probable cause to believe that the suspect was under the influence, that he has committed a felony of which being under the influence of alcohol is an element, and that he is presently at home. In addition, the time interval between the offense and the entry must be brief enough so that evidence of drinking would still remain in the blood. Without the concurrence of these four factors, the possibility

> of losing evidence of guilt through delay would be too speculative to justify a nonconsensual intrusion into a private residence.

(Footnote omitted.) The four criteria outlined by the Keltie court are satisfied by the evidence in this case.[1]

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[1] We recognize that People v. Keltie, 148 Cal. App. 3d 773, 196 Cal. Rptr. 243, 247 (1983), speaks in terms of felony offenses. However, though we have focused our analysis on an offense which, in this case, happens to be classified as a felony, we leave for another day the question of whether a warrantless entry would be justified where the underlying offense is of a less serious nature. In this regard we note that after Keltie, the United States Supreme Court and a California appellate court rejected a bright line felony/nonfelony approach to warrantless entries. Welsh v. Wisconsin, ___ U.S. ___, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984); People v. Hampton, 209 Cal. Rptr. 905 (1985). The Hampton court distinguished Keltie and upheld a warrantless entry even though the underlying offense of drunk driving was classified as a misdemeanor. In our view, the seriousness of the offense, rather than its technical classification, is the proper focus under Keltie, Hampton, and Welsh. See our discussion of Welsh, infra.

First, the troopers had probable cause[2] to believe that Komoto had been drinking because: (1) a witness described Komoto's erratic driving to the troopers; (2) the witness also described how Komoto's vehicle veered off the road, hit the pedestrian victim, and then continued down the highway; (3) The accident occurred at about 1 a.m., approximately 16 to 18 blocks from Komoto's residence; (4) one of the arresting troopers had stopped Komoto only 26 hours earlier for erratic driving; (5) this latter stop occurred only 3 to 4 blocks from Komoto's residence; and (6) the trooper making the

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[2] "Probable cause is based upon the totality of facts and circumstances within the knowledge of the arresting officer." State v. Cottrell, 86 Wn.2d 130, 132, 542 P.2d 771 (1975). The test is one of reasonableness in light of the time, the place, the pertinent circumstances, and the considerations of everyday life on which prudent men, not legal technicians, act. Cottrell, at 132.

earlier stop had detected the odor of intoxicants on Komoto's breath and, after administering physical sobriety tests, had concluded that Komoto was physically affected by alcohol. These facts are consistent with, and give rise to reasonable inferences of driving under the influence. Automobiles do not normally leave the the road unless the driver is impaired or inattentive. Furthermore, since the troopers knew that nearly identical conduct involving the same vehicle and driver occurred at approximately the same time and place on the previous evening, and since they also knew that the driver was impaired by alcohol on the previous evening, then the troopers could reasonably infer that alcohol was involved in the most recent incident.

In short, taken together, these facts and circumstances were sufficient

"to warrant a man of reasonable caution" in a belief that Komoto had been drinking on the night of the accident. State v. Fricks, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979); State v. Turner, 29 Wn. App. 282, 287, 727 P.2d 1324 (1981). We note that the facts and circumstances known to the troopers in this case were particularly indicative of an alcohol-related offense when viewed in light of the troopers' previous police experience. See State v. Kirvin, 37 Wn. App. 452, 456-57, 682 P.2d 919 (1984) (standard for probable cause is "'not what might appear to be probable cause to a passerby, but what would be probable cause to a reasonable, cautious and prudent officer.'"). One of the arresting troopers testified that, in his experience, the likelihood that an early morning hit and run accident will be alcohol related is "very, very high."

Second, in view of the above

mentioned circumstances, the severity of the victim's injuries, and the information regarding fresh damage to and eyewitness identification of Komoto's vehicle, a man of reasonable caution would be warranted in a belief that Komoto (1) was operating a motor vehicle; (2) was driving while intoxicated; (3) was involved in a felony hit and run accident; and (4) had struck a pedestrian who, according to paramedics, was near death. While these beliefs could eventually give rise to charges of driving while intoxicated, felony hit and run and negligent homicide, we find the latter alone sufficient to justify entry under these circumstances.[3]

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[3] We recognize that death had not in fact occurred at the time of the entry; however, the troopers had reasonable grounds to believe that death of the victim was imminent. This strong likelihood of death, coupled with the blood alcohol exigency discussed later in

Third, the record contains ample evidence supporting a conclusion that, at the time of their entry, the arresting troopers had probable cause to believe that Komoto was inside his residence. Three troopers testified that they found Komoto's freshly damaged car in the parking lot of his apartment complex. All three noted that the hood of Komoto's car was still warm. Also, prior to entering Komoto's apartment, one trooper looked in the apartment window and noticed that the lights and television were on. This trooper then contacted the assistant manager of the apartment and verified that the apartment was Komoto's and that Komoto was the sole occupant. Under these circumstances, the troopers had probable cause to believe that Komoto

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this opinion, created an emergency situation justifying entry for the preservation of important evidence.

was inside the apartment.

Finally, since only an hour or so had elapsed between the accident and the entry, blood alcohol evidence was clearly still retrievable.

Having concluded that the troopers had probable cause to arrest Komoto for an alcohol-related offense, we must now determine whether "exigent circumstances" justified the warrantless and non-consensual entry into Komoto's residence. Though it is not yet clear what circumstances qualify as "exigent circumstances," several broad categories have been established by appellate courts, including: (1) hot pursuit; (2) fleeing suspect; (3) danger to public or arresting officer; (4) mobility of the vehicle; and (5) destruction or mobility of evidence. State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 2087 (1983). As indicated earlier, the State contends that

the natural and inexorable dissipation of blood alcohol evidence may create a "destruction of evidence" exigency sufficient to justify a warrantless entry. This proposition is generally accepted by federal and state courts. Welsh v. Wisconsin, ___ U.S. ___, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984); People v. Keltie, 148 Cal. App. 3d 773, a96 Cal. Rptr. 243, 247 (1983); Stark v. New York State Department of Motor Vehicles, 104 App. Div. 2d 194, 483 N.S.S. 2d 824 (N.Y.A.D. 3 Dept., Dec. 13, 1984) (No. 47838); cf. State v. Judge, 100 Wn. 2d 706, 712, 675 P.2d 219 (1984).

Beyond recognizing that the percentage of blood alcohol begins to diminish shortly after drinking stops, courts have also noted that any delay in testing for blood alcohol evidence creates a risk that the suspect may consume additional alcohol or other

intoxicants during the delay, thereby rendering any test results inaccurate. Welsh, 80 L. Ed. 2d 752; Stark v. New York Department of Motor Vehicles, supra. However, these factors do not automatically justify warrantless entries whenever blood alcohol evidence is dissipating. In Welsh, the United States Supreme Court held that an important factor in determining whether an exigency exists is "the gravity of the underlying offense for which the arrest is being made." Welsh, 80 L. Ed. 2d at 745. While the Welsh court stopped short of drawing a bright line between felonies and nonfelonies, the opinion indicates that circumstances are more clearly exigent where the offense is a "serious crime." In the instant case, one of the possible offenses underlying Komoto's

arrest was negligent homicide.[4] In this state, negligent homicide[5] is a serious offense punishable by up to 10 years in prison. The severity of this penalty clearly places the present case within the scope of the "serious crimes" contemplated by Welsh. Thus, we conclude

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[4] RCW 46.61.520 (1981) provides:

"Negligent homicide by motor vehicle --Penalty. (1) When the death of any person shall ensue within three years as a proximate result of injury received by the driving of any vehicle by any person while under the influence of or affected by intoxicating liquor or drugs, or by the operation of any vehicle in a reckless manner or with disregard for the safety of others, the person so operating such vehicle shall be guilty of negligent homicide by means of a motor vehicle.

"(2) Any person convicted of negligent homicide by means of a motor vehicle shall be punished by imprisonment in the state penitentiary for not more than ten years, or by imprisonment in the county jail for not more than one year, or by fine of not more than one thousand dollars, or by both fine and imprisonment."

[5] The negligent homicide statute was amended in 1983. The offense is now called "vehicular homicide."

that the gravity of the offense and the imminent destruction of evidence created an exigency sufficient to justify the warrantless nonconsensual entry of Komoto's apartment.[6]

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[6]Our conclusion gains support from, and is consistent with the tenor of drunk driving legislation in this state. In particular, our statute regarding blood alcohol tests announces a strong state interest in preserving blood alcohol evidence in circumstances such as those presented here. RCW 46.20.308 (1981) The statute states, in pertinent part:

> **46.20.308 Implied consent -- Revocation, etc., for refusal to submit to chemical tests to determine alcoholic content of blood.** (1) Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent, subject to the provisions of RCW 46.61.506, to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any alcohol related offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the direction of a law enforcement officer having

Komoto also contends that the taking of blood samples was unconstitutional in this case because the troopers did not have a "clear indication: that blood

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reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon the public highways of this state while under the influence of intoxicating liquor. Such officer shall inform the person of his right to refuse the test, and of his right to have additional tests administered by a qualified person of his choosing as provided in RCW 46.61.506. The officer shall warn the driver that his privilege to drive will be revoked if he refuses to submit to the test. Unless the person to be tested is unconscious, the chemical test administered shall be of his breath only: Provided, That if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which another person has been injured and there is a reasonable likelihood that such other person may die as a result of injuries sustained in the accident, a blood test may be administered without the consent of the individual so arrested

(Emphasis added.) (This statute was amended in 1983 to reflect the change from "negligent homicide" to "vehicular homicide".)

alcohol evidence would be found. We disagree. Komoto's argument on this point mistakenly focuses on whether the troopers had a "clear indication" prior to entering Komoto's apartment. The "clear indication" referred to in State v. Judge, supra, is not a test for probable cause to enter a dwelling; rather, the test has to do with probable cause to "seize" a suspect's blood without a warrant. Thus, the facts supporting a "clear indication" could include facts lawfully obtained at least up until Komoto was taken to the hospital. In this case, such facts would include the troopers' observations of Komoto inside his apartment. In any event, if the "clear indication" referred to in Judge is equivalent to the probable cause needed to enter Komoto's dwelling, even if we consider only the facts known prior to entry, our previous

analysis of probable cause resolves this issue against Komoto.

Finally, Komoto argues that the troopers should have obtained a telephonic search warrant prior to entering his apartment pursuant to CrR 2.3 (c). Though the rule empowers an officer to seek telephonic approval from a magistrate to engage in a search, there is no indication that procedures for complying with the rule were in place.[7] We hold, however, that the need for the immediate taking of a blood sample under the circumstances of this case was a sufficient exigency to justify proceeding without a warrant, or without attempting

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[7] We urge the State to undertake implementation of CrR 2.3(c). We note that in some circumstances, the presence of the rule authorizing telephonic search warrants may be sufficient to defeat an exigent circumstances argument. See State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983).

to obtain a telephonically authorized warrant. As we noted previously in this opinion, any delay in testing for blood alcohol evidence creates a risk that a suspect will consume additional intoxicants during the delay, thereby casting doubt on the accuracy of any tests.

Finding nc error, the judgment of the trial court is affirmed.

Coleman, J.

The Supreme Court
State of Washington

August 23, 1985

Ms. Shirley Bennington
Attorney at law
400 Arctic Building
Seattle, Washington 98104

Honorable Norm Maleng
King County Prosecutor
Mr. Robert Crandall, Deputy
King County Courthouse
Seattle, Washington 89104

Re: Supreme Court No. 51664-2 State v. Clifford Brian Komoto
Court of Appeals No. 13969-0-1

Counsel:

The above entitled petition for review was considered by the Court on its August 22, 1985, En Banc Administrative Conference.

The petition was denied by order number 141/110 filed on August 22, 1985.

Very truly yours,

REGINALD N. SHRIVER
Supreme Court Clerk

RNS:crf
Encl

APPENDIX E

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CLIFFORD BRIAN KOMOTO, Appellant.	)	MANDATE
	)	No. 13969-0-1
	)	King County No. 83-1-01604-1

The State of Washington to: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on April8, 1985, became the decision terminating review of this court in the above entitled case on September 25, 1985. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Mandate after opinion is filed.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Seattle this 25th day of September, 1985.

Richard D. Taylor

Clerk of the Court of Appeals, State of Washington Division I.

APPENDIX F

CERTIFICATE OF FILING AND SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KING)

Samuel Stiltner, a member of the Bar of this Court, being duly sworn, deposes and says:

That on October 15, 1985, pursuant to rule 28 of this Court, he filed and served the within Petition for Writ of Certiorari to the Washington State Court of Appeals, Division One. Filing was made by depositing in a United States Post Office mailbox at Seattle, Washington, with first class postage prepaid, addressed to the Clerk of the Supreme Court of the United States, United States Supreme Court Building, Washington D.D. 20543, within the time allowed for filing. Service was made in the same manner upon the interested parties at the following addresses:

Charles Fried
Acting Soliciter General
of the United States
Department of Justice
Washington D.C. 20503

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State of Washington
Temple of Justice
Olympia, Washington 98504-0511

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Clerk of the King County Superior Court
E-609
King County Courthouse
516 3rd Ave.
Seattle, Washington 98104

Clifford H. Komoto
1003 E. Laurel St.
Kent, Washington 98031

All parties required to be served heve been served.

Subscribed and sworn to before me this 15th day of October, 1985.

Notary Public, in and for the State of Washington, residing at